91-844

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOE HARRISON BENNETT,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Appeal for the United States Court For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN S. COLLEY, III
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QUESTIONS PRESENTED

Did the Petitioner waive his right to have venue proven by failing to object prior to the close of the government's case?

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TABLE OF AUTHORITIES

CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported,and is annexed as Appendix A. The judgment of the District Court for the Middle District of Tennessee is not reported and is annexed as Appendix B. The order of the District Court for the Middle District of Tennessee denying Petitioner's Motion for Acquittal/ New Trial is not reported and is annexed as Appendix C.

JURISDICTION

This case comes before the Court on a petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Sixth Circuit affirming the conviction of the petitioner in the United States District Court for the Middle District of Tennessee. The petitioner was indicted by a federal grand jury, tried and convicted for a violation of 18 U.S.C. Section 922 (g)(1),

Possession of Firearms by a Convicted Felon.

The petitioner filed his Notice of Appeal in the district court on February 14, 1991, after his conviction was entered in said court on February 4, 1991. The judgment of the Court of Appeals for the Sixth Circuit was entered on August 20, 1991, and no rehearing was sought.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

"[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

United States Constitution,
Article III, Section 2,
Clause 3

"**Rights of the accused.-** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment VI

STATUTORY PROVISIONS INVOLVED

" **Rule 18. Place of Prosecution and Trial.**

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice."

Federal Rules of Criminal Procedure, Rule 18

The statute under which the petitioner was prosecuted, although nothing turns on its terms, was 18 U.S.C. Section 922(g)(1), which provides as follows:

(g) It shall be unlawful for any person-

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

The indictment is attached as Appendix D. It alleges a violation of 18 U.S.C. Section 922(g)(1) occurring in the Middle District of Tennessee.

Nashville, Tennessee native Larry Warwick, going through a divorce, was worried that he would lose his gun collection in the legal proceedings. He called his friend Joe Harrison Bennett and asked Bennett if he would keep the guns for him. Bennett replied that he had a safe place for the guns, and consequently Warwick dropped off nine of his guns at Bennett's house. Warwick did not see the guns again until he visited the office of

Alcohol, Tobacco and Firearms to identify his guns.

Bennett later admitted in a deposition given in Franklin, Tennessee that he had indeed kept the firearms for Warwick, and that at that time he was a convicted felon.

Charles Humphrey, an agent with the Nashville office of the Bureau of Alcohol, Tobacco and Firearms, verified that all the firearms in question had moved in interstate commerce.

Counsel for the petitioner moved, nonspecifically, to dismiss the charges at the close of the government's case, which motion was overruled. The petitioner chose not to testify.

The petitioner requested a special jury instruction on venue. After much discussion on the issue of venue, during which time the trial judge and the government both admitted there had been no

proof as to where the petitioner was when he was in possession of the guns, the government moved to reopen its proof, and that request was denied. The trial judge also overruled the petitioner's renewed, more specific motion for acquittal, and submitted the question to the jury.

The jury returned a guilty verdict.

The trial court denied the petitioner's renewed motion for judgment of acquittal/new trial (App. C)

The Court of Appeals for the Sixth Circuit refused to address the question of whether sufficient evidence existed of venue, ruling instead that the petitioner had waived any venue objection by not objecting until the government had closed its case, citing **U.S. v. Burkhart,** 501 F. 2d 993 (6th Cir. 1974), **cert. denied,** 420 U.S. 946, 95 S.Ct. 1326, 43 L.Ed 2d 424 (1975) (App. A, p. 2).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents the important question of whether the accused waives his constitutional and statutory rights to have venue proven by not objecting prior to the close of the government's case. This Court has yet to address the issue, but needs to.

Review is merited first of all, because the Sixth Circuit ruling conflicts with the holdings of the following circuits:

Second. "Since the indictment alleged that the returns had not only been prepared in but filed from the Southern District, there was no basis for Gross' moving against it for improper venue (citations omitted); he was entitled to await the government's case and to move when the government failed to prove that all the elements charged to have taken place in the Southern District in fact

occurred there (citations omitted)." **U.S. v. Gross**, 276 F.2d 816 (2d Cir. 1960), **cert. denied**, 363 U.S. 831, 80 S.Ct. 1602, 4 L.Ed.2d 1525 (1960). **See also U.S. v. Menendez**, 612 F.2d 51 (2d Cir. 1979); **U.S. v. Price**, 447 F.2d 23 (2d Cir. 1970), **cert. denied**, 404 U.S. 912, 92 S. Ct. 232, 30 L.Ed.2d 186 (1971); **U.S. v. Potamitis**, 739 F.2d 784 (2d Cir. 1984), **cert. denied sub nom. Argitakos v. U.S.**, 469 U.S. 918, 105 S.Ct. 297, 83 L.Ed.2d 232, **cert. denied**, 469 U.S. 934, 105 S. Ct. 332, 83 L.Ed 2d 269 (1985).

Fifth. **U.S. v. White**, 611 F.2d 531 (5th Cir. 1980), **cert. denied**, 446 U.S. 992, 100 S.Ct. 2978, 64 L.Ed.2d 849 (1980).

Seventh. "A challenge to venue in a motion for acquittal is timely only where there is a proper allegation of venue which is not sustained by the evidence...(citations omitted)...In such a

case the defendant has no notice of a defect of venue until the Government rests without proving what it has alleged. Until he has such notice, there can be no waiver. (citation omitted)" **U.S. v. Bohle**, 445 F.2d 54 (7th Cir. 1971). See also **U.S. v. McDonough**, 603 F.2d 19 (7th Cir. 1979).

Eighth. "However, when an indictment contains a proper allegation of venue so that a defendant has no notice of a defect of venue until the government rests its case, the objection is timely if made at the close of the evidence. (citations omitted)" **U.S. v. Black Cloud**, 590 F.2d 270 (8th Cir. 1979).

Ninth. **Gilbert v. U.S.**, 359 F.2d 285 (9th Cir. 1966), **cert. denied**, 385 U.S. 882, 87 S.Ct. 169, 17 L.Ed.2d 109 (1966).

Tenth. **Jenkins v. U.S.**, 392 F.2d 303 (10th Cir. 1968).

In addition, the Sixth Circuit opinion in the case at bar conflicts with other Sixth Circuit rulings. **U.S. v. McMaster,** 343 F.2d 176 (6th Cir. 1965), **cert. denied,** 382 U.S. 818, 86 S.Ct. 42, 15 L.Ed.2d 65 (1965), **reh'g denied,** 382 U.S. 1000, 86 S.Ct. 529, 15 L.Ed.2d 489 (1966) held "Further, no objection having been made **prior to verdict,** objection thereto was waived" (emphasis added; citations omitted). **McMaster, supra,** at 343 F.2d 181.

Likewise, **U.S. v. Charlton,** 372 F.2d 663 (6th Cir. 1967), **cert. denied,** 387 U.S. 936, 87 S.Ct. 2062, 18 L.Ed.2d 999 (1967) involved a motion for judgment of acquittal on the ground that venue was not proven. That motion was not found to be untimely.

This Court has long held such matters to be substantial. Justice Frankfurter wrote

> "Questions of venue in criminal cases...are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."
>
> **U.S. v. Johnson,** 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236 (1944).

The right to have venue proven as an element of the crime is founded in Article 3, Section 2 of, and the Sixth Amendment to, the United States Constitution. **Travis v. U.S.,** 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961).

The Federal Rules of Criminal Procedure similarly require proof of venue. See Rule 18, **Federal Rules of Criminal Procedure.**

Thus, the opinion in the case at bar not only brings the Sixth Circuit into direct conflict with other circuit courts, but violates the petitioner's rights under the constitution, and Rule 18 of the Federal Rules of Criminal Procedure.

Finally, the application of the ruling of the Sixth Circuit in the case at bar would require clairvoyance on the part of the defendant in a criminal case to know when the government was **not** going to prove venue, as the Sixth Circuit has held such an objection must be made **before** the government has completed is proof. As a practical matter, then, the Sixth Circuit holding effectively deprives the accused of the right to have the government prove venue. If the criminal defendant must make his objection before the government closes, how will he know whether the objection will be justified by the proof, or rather, the lack of proof? Or when to make the objection?

The opinion below ignores the practical, as well as legal, realities of proving venue at trial and remedying the failure of the government to prove venue. When the criminal defendant has no prior

notice of the venue issue because the indictment is facially valid regarding venue, he can have no notice of the government's shortcomings until the government closes. He cannot come to court armed with a Ouija board, or Tarot cards.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the Court for their resolution.

Respectfully submitted,

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FILED
AUG 20, 1991
Leonard Green, Cle

NOT FOR PUBLICATION
NO. 91-5220

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	ON APPEAL FROM
	)	THE UNITED STATES
Plaintiff-Appellee,	)	DISTRICT COURT
	)	FOR THE MIDDLE
v.	)	DISTRICT OF
	)	TENNESSEE
JOE HARRISON BENNETT,	)	
	)	
Defendant-Appellant.	)	

BEFORE: KEITH and BOGGS, Circuit Judges; and RUBIN, District Judge.*

PER CURIAM. The defendant, Joe Harrison Bennett, was convicted of being a felon in possession of a firearm. Bennett had a fried Larry Warwick, who was, at the time of this offense, undergoing a rather nasty divorce. Warwick believed that he was going to lose out in the divorce. In

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* The Honorable Carl B. Rubin, United States District Judge for the Souther District of Ohio, sitting by designation.

particular, he worried about losing his gun collection. Consequently, Warwick called Bennett and asked him to take his gun collection for safekeeping. Warwick believed that the location of Bennett's home--out in the country, away from children--provided the ideal location for gun storage. Accordingly, he called Bennett to ask him to take the guns for a while. Bennett quickly agreed. He then took the guns to Bennett's house, and gave them to Bennett.

Subsequently, however, he went to the office of the Bureau of Alcohol, Tobacco, and Firearms, where he spoke to an agent Cooper. He told agent Cooper that Bennett had the guns. The ATF got a search warrant and raided Bennett's house, where they found the guns.

After the close of all evidence at his trial, Bennett moved for a direct verdict, arguing that the government failed to prove venue. The government asked for permission to reopen its case, which was denied. Nonetheless, the court denied Bennett's motion. Although the government, as a constitutional matter, must prove venue, it need only do so by a preponderance of the evidence; it is not an element of the offense. **United States v. Charlton,** 372 F.2d 663, 6667 (6th Cir. 1967). We have held that objections to venue are waived unless the defendant makes the objection prior to the close of the government's case. **United States v. Burkhart,** 501 F.2d 993,996 (6th Cir. 1974). Accordingly, Bennett waived his objection to venue. His conviction, therefore, is **AFFIRMED.**

MANDATE ISSUED: 9/16/91
COSTS: No Costs

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA
V.
JOE HARRISON BENNETT

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:89-00037

(Name and Address of Defendant) _____
Jerry C. Colley
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) _____, and
☐ not guilty as to count(s) _____.

THERE WAS A:
[☐ finding ☒ verdict] of guilty as to count(s) Two.

THERE WAS A:
[☐ finding ☐ verdict] of not guilty as to count(s) _____.
☐ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Possession and Receipt of Firearms by a Convicted Felon, Title 18, United States Code, Section 18:922(g)(1) and 924(a)(1)(B). Offense committed on or

about April 9, 1988.

IT IS THE JUDGMENT OF THIS COURT THAT defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: an intermittent period of 6 months, 2 months and 4 months. The Court recommends this sentence be served in a jail-type institution. The defendant is to report to the institution designated on or before Noon, February 20, 1991, for a period of 2 months; and will remain on his current bond until such time. The defendant will be released to plant and harvest tobacco.

On or before Noon, January 2, 1992, the defendant will report to complete the remainder of the sentence (4 months). During the interim between imprisonments, the defendant will not be under the direct supervision of the U.S. Probation Office, but will be under the standard conditions of same. A 2 year period of Supervised Release is imposed. A fine of $2,000 and Special Assessment of $50 have been paid and no additional fine will be imposed. The defendant was advised of his appeal rights, which must be received by the Court on or by February 14, 1991.

THIS SENTENCE IS IMPOSED PURSUANT TO THE SENTENCING REFORM ACT OF 1984.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) _____

which has been paid in full.

IT IS FURTHER ORDERED THAT the following count(s) is/are dismissed on motion of the United States:

IT IS FURTHER ORDERED that the defendant shall pay to the Clerk of the United States District Court any amount imposed as a fine or special assessment. It is further ordered that the defendant shall pay to the U.S. Department of Justice any amount imposed as restitution. It is further ordered that the defendant shall notify the United States Attorney for the district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by the Judgment are fully paid.

☐ The Court makes the following recommendations to the Bureau of Prisons:

The defendant be incarcerated in a jail-type institution.

February 4, 1991
Date of Imposition of Sentence

Signature of Judicial Officer
Thomas A. Wiseman, Jr., Chief U.S. District Judge

Name and Title of Judicial Officer

Date

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
Date

at _____, the institution designated by the Bureau of Prisons with a certified copy of this Judgment.

United States Marshall

By: _____
Deputy Marshall

Defendant: Joe Harrison Bennett
Case Number: 3:89-00037

PROBATION

The defendant is hereby placed on probation for a term of N/A.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this Court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of probation that the defendant pay any such restitution that remains unpaid at the commencement of the term of probation. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: Joe Harrison Bennett
Case Number: 3:89-00037

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

FILED
DEC 13, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
VERSUS	)	DOCKET NO. 3-89-00037
JOE HARRISON BENNETT,	)	JUDGE WISEMAN
Defendant.	)	

MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

Comes now the defendant, Joe Harrison Bennett, by and through counsel, and pursuant to Federal Rules of Criminal Procedure 29 and 33, moves the Court to set aside the verdict of guilty returned on December 6, 1990, and enter a Judgment of Acquittal and in the alternative grant him a new trial.

As regards the Motion for Judgment of Acquittal, defendant would show the following:

1. There was no proof of venue in the record in the trial of this cause, not

even any circumstantial evidence as to where the alleged offense occurred.

2. As a matter of law, there was insufficient evidence the defendant guilty beyond a reasonable doubt.

As regards the Motion for New Trial, defendant would show the following:

1. The testimony of Richard Buerger was "fruit of the poisonous tree" and inadmissible in light of the Sixth Circuit's holding in the case at bar suppressing the guns and other evidence seized from the defendant's home.

1./27/90 Denied by: Judge Wiseman

FILED
FEB 28, 1989

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	NO. 3-89-00037
	)	
v.	)	18 U.S.C. § 922(g)(1)
	)	18 U.S.C. § 924(a)(1)(B)
JOE HARRISON BENNETT,	)	

I N D I C T M E N T

COUNT ONE

The Grand Jury charges:

In or about March 1987, in the Middle District of Tennessee, JOE HARRISON BENNETT, being a person who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully received and possess a firearm, that is, a .22 caliber Butler Derringer, which firearm had previously been transported in interstate or foreign commerce.

In violation of Title 18, United States Code, Section 922(g) (1) and 924(a) (1)(B).

COUNT TWO

The Grand Jury further charges:

On or about April 9, 1988, in the Middle District of Tennessee, JOE HARRISON BENNETT, being a person who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowing and unlawfully possess a quantity of firearms, which firearms had previously been transported in interstate or foreign commerce.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(1)(B).

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

I, John S. Colley, III, one of the attorneys for the Joe Harrison Bennett, Petitioner herein, hereby certify that on the 23rd day of October, 1991, I served copies of the foregoing Petition for Writ of Certiorari on the United States by mailing copies in duly addressed envelopes with first-class postage prepaid, to the offices of (1) H.H. Hester, Assistant U.S. Attorney for the Middle District of Tennessee, 37203-3870, and (2) The Solicitor General, Department of Justice, Washington, D.C. 20530.

JOHN S. COLLEY, III
Attorney for Joe H. Bennett
P.O. Box 1476
Columbia, Tennessee 38402
(615) 388-8564

(2)

No. 91-844

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOE HARRISON BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
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QUESTION PRESENTED

Whether the government presented sufficient proof of venue.

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TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-844

JOE HARRISON BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported, but the judgment is noted at 941 F.2d 1210 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1991. The petition for a writ of certiorari was filed on October 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to six months' intermittent confinement, to be followed by a two-year term of supervised release. He was also ordered to pay a $2000 fine. Pet. App. B1-B2. The court of appeals affirmed. *Id.* at A1-A3.

1. Larry Warwick, a resident of Nashville, Tennessee, asked petitioner, a convicted felon, to take Warwick's firearms collection for safekeeping pending Warwick's divorce proceeding. After petitioner agreed, Warwick took the firearms to petitioner's house. Thereafter, Warwick told agents of the Bureau of Alcohol, Tobacco, and Firearms (BATF) in Nashville that petitioner had the firearms. Pursuant to a warrant, the agents searched petitioner's residence and seized the firearms. Pet. App. A1-A2; Gov't C.A. Br. 2-4.

2. During voir dire and again in closing argument, petitioner's trial counsel indicated that petitioner lived in Williamson County, which is in the Middle District of Tennessee. C.A. App. 15, 47, 48; see also 28 U.S.C. 123(b)(1). During the charge conference after both sides had rested, however, the district court expressed doubt about whether the government had shown at trial where petitioner's residence was located. C.A. App. 36. The government moved to reopen its case; petitioner moved for an acquittal for insufficient proof of venue. The district court denied both motions. *Id.* at 39-46. In its charge to the jury, the district court listed the counties that are in the Middle District of Tennessee and instructed the jury that the government had to prove beyond a reasonable

doubt that the offense with which petitioner was charged had occurred in that district. *Id.* at 49-50.

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A3. The court held that petitioner had waived his venue challenge by failing to object prior to the close of the government's case. *Id.* at A3.

ARGUMENT

Petitioner renews his contention (Pet. 9-10, 16) that the government failed to prove venue. He also contends (Pet. 11-15) that the court of appeals' decision that he waived his challenge to venue conflicts with decisions of other courts of appeals. We acknowledge that other courts of appeals disagree with the Sixth Circuit on this issue. There is no need for this Court to resolve that conflict in this case, however, because the evidence was sufficient to show that venue was properly laid in the Middle District of Tennessee.

Article III, § 2, Cl. 3, and the Sixth Amendment of the Constitution require that a criminal trial be held in the State and District in which the offense occurred. See also Fed. R. Crim. P. 18. Venue, however, may be proved circumstantially, see, *e.g.*, *United States* v. *Leight*, 818 F.2d 1297, 1305 (7th Cir.), cert. denied, 484 U.S. 958 (1987); *United States* v. *McLean-Davis*, 795 F.2d 957, 958 (11th Cir. 1986), cert. denied, 479 U.S. 1060 (1987), and is sufficiently proved if it is established by a preponderance of the evidence, see, *e.g.*, *United States* v. *Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991); *United States* v. *Bryan*, 896 F.2d 68, 72 (5th Cir.), cert. denied, 111 S. Ct. 76 (1990). On appeal, the evidence of venue must be viewed in the light most favorable to the government, and all reasonable inferences and credibility choices must be resolved in favor of the jury's verdict. *E.g.*, *United*

States v. *Burroughs*, 830 F.2d 1574, 1580 (11th Cir. 1987), cert. denied, 485 U.S. 969 (1988); *United States* v. *Rinke*, 778 F.2d 581, 584 (10th Cir. 1985).

Under those standards, the evidence at trial sufficed to show that petitioner's residence was located in the Middle District of Tennessee. All of the significant events occurred either in Davidson County—specifically, in Nashville—or in neighboring Williamson County, both of which are in the Middle District of Tennessee, 28 U.S.C. 123(b)(1). Warwick testified that, after petitioner agreed to keep the firearms at his residence, Warwick went "down there" to petitioner's house "in the country." C.A. App. 16-17. Williamson County borders the Nashville metropolitan area on the south, and the jury could reasonably have understood Warwick's statement that he went "down" to petitioner's house to mean that petitioner's house was located south of Nashville. Further, the documentary evidence showed that petitioner had been placed on probation in Williamson County. Gov't C.A. Br. 8. That fact implied that petitioner resided in or around Williamson County. In addition, the evidence showed that petitioner appeared for a deposition in a civil action at a law office in Williamson County two months after he received the firearms from Warwick, which indicated a further contact between petitioner and Williamson County. C.A. App. 21-23. The Middle District of Tennessee covers the entire portion of Tennessee, all the way to the Alabama-Mississippi border. See 28 U.S.C. 123(b)(1). Under those circumstances, and in light of the evidence linking petitioner to Williamson County, the jury could properly infer that petitioner's residence, which was "down there" and "in

the country," was within the Middle District of Tennessee.*

* The jury was instructed that it had to find that venue was proper beyond a reasonable doubt. C.A. App. 49. It is well settled, however, that venue need only be proved by a preponderance of the evidence. *E.g.*, *United States* v. *Gonzalez*, 922 F.2d 1044, 1054-1055 (2d Cir.), cert. denied, No. 91-5371 (Dec. 16, 1991); *United States* v. *Lam Kwong-Wah*, 924 F.2d at 301; *United States* v. *Smith*, 918 F.2d 1551, 1557 (11th Cir. 1990); *United States* v. *Bryan*, 896 F.2d at 72. The fact that the jury found venue with a higher degree of certainty than required warrants particular deference to that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
THOMAS E. BOOTH
Attorneys

JANUARY 1992

☆ U.S. GOVERNMENT PRINTING OFFICE 1992-312-324/45277